No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER

SHERRILYN IFILL
Director-Counsel
JANAI NELSON
CHRISTINA SWARNS
JIN HEE LEE
LILIANA ZARAGOZA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

JOHN PAUL SCHNAPPER-CASTERAS *
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005
202-682-1300
jschnapper@naacpldf.org

July 13, 2015

* *Counsel of Record*

[Additional Counsel On Inside Cover]

MARCIA D. GREENBERGER
Co-President
EMILY J. MARTIN
FATIMA GOSS GRAVES
AMY K. MATSUI
NATIONAL WOMEN'S LAW
CENTER
11 Dupont Circle, NW #800
Washington, DC 20036

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INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to achieve racial justice and to ensure that America fulfills its promise of equality for all. To this end, LDF has litigated a range of employment discrimination cases in this Court, as well as the lower courts, appearing as counsel of record or *amicus curiae*. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Since 1964, LDF has also worked ceaselessly to enforce Title VII, litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices in such cases as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), whose rulings were ultimately codified in the Civil Rights Act of 1991.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace and has promoted voluntary compliance by employers with

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

federal and state civil rights laws. Securing equal opportunity for women requires not only the right to a workplace that is free from all forms of discrimination and exploitation, but also access to effective means of enforcing that right. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases seeking to protect Title VII rights and the availability of effective means of enforcing them in this Court and in federal courts of appeals.

Given their expertise, NWLC and LDF believe their perspectives will help this Court resolve the issues presented by this case. *Amici curiae* urge the Court to reverse the Tenth Circuit's ruling and remand for further proceedings.

BACKGROUND

Title VII of the Civil Rights Act of 1964 was enacted to detect and eliminate discrimination in employment. Its "central statutory purpose [is] . . . eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle*, 422 U.S. at 421. *See also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (couching primary objective as "to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees") (citing *Griggs*, 401 U.S. at 427; *Albemarle*, 422 U.S. at 416). In order to achieve this goal, Title VII not only prohibits discriminatory employment practices that are express and direct, but also those that are subtle and indirect. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise.").

The doctrine of constructive discharge is a key component of Title VII's anti-discrimination mandate. "The constructive discharge concept originated in the labor-law field in the 1930's," in the face of intolerable working conditions experienced by employees who engaged in union activity. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (citations omitted). "Over the next two decades, Courts of Appeals sustained NLRB [National Labor Relations Board] constructive discharge rulings." *Id.*

"By 1964, the year Title VII was enacted, the doctrine [of constructive discharge] was solidly established in the federal courts." *Id.* at 142 (citation omitted). Since then, the circuits "have recognized constructive discharge claims in a wide range of Title VII cases," including claims involving discrimination and harassment based on race, pregnancy, national origin, sex, and religion. *Id.* (collecting cases). *See also id.* ("[A]pplication of the constructive discharge doctrine to Title VII cases has received apparently universal recognition among the courts of appeals.") (citing *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3rd Cir. 1984)).

Today, the basic contours of a constructive discharge claim are well-settled: "the plaintiff . . . must show that the abusive working environment became so intolerable that [his or] her resignation qualified as a fitting response." *Suders*, 542 U.S. at 134. Before a court may consider a Title VII claim, a plaintiff generally must first seek redress through

administrative channels.[2] In the private sector, employees must file administrative charges with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of an alleged unlawful employment practice.[3] Federal employees "must initiate contact with [an EEOC] Counselor within 45 days of the date of the matter alleged to be discriminatory. . . ." 29 C.F.R. § 1614.105(a)(1). While other deadlines and requirements apply to other parts of the process, the 45-day period applicable to federal employees effectively operates as a statute of limitations.[4]

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[2] *See generally Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) ("Title VII places primary responsibility for disposing of employment discrimination complaints with the EEOC in order to encourage informal conciliation of employment discrimination claims and foster voluntary compliance with Title VII . . . . Title VII plaintiffs must therefore exhaust their administrative remedies before seeking judicial relief from discriminatory action."); *see also Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) (finding that administrative procedures form part of a system "in which laymen, unassisted by trained lawyers, initiate the process").

[3] In the private sector, "[a] charge . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," or, if state proceedings are also initiated, "within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier." 42 U.S.C. § 2000e-5(e)(1) (Title VII).

[4] *See Winder v. Postmaster Gen.*, 528 F. App'x 253, 255 (3d Cir. 2013) (unpublished) ("This 45–day time limit operates akin to a statute of limitations."); *Fitzgerald v. Henderson*, 251 F.3d

With respect to constructive discharge claims, the circuits disagree about when this 45-day limitations period begins to run. A majority of circuits have held that the filing period begins to run on the date of the employee's resignation, with some courts reasoning that the resignation itself constitutes the employer's last discriminatory act (hereinafter, "Date-of-Resignation Rule").[5] A minority of circuits, including the Tenth Circuit in this case, have held that the employer's last discriminatory act triggers the relevant filing period (hereinafter, "Last Discriminatory Act Standard").[6]

345, 359 (2d Cir. 2001) ("The 45-day period serves as a statute of limitations."); *Johnson v. Runyon*, 47 F.3d 911, 917 (7th Cir. 1995) ("This deadline is construed as a statute of limitations.").

[5] *See Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000) ("[T]he date of discharge triggers the limitations period in a constructive discharge case, just as in all other cases of wrongful discharge."); *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998) (holding that the filing period begins to run from the date of an employee's formal resignation); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998) ("[I]n constructive discharge cases periods of limitation begin to run on the date of resignation."); *Hukannen v. Int'l Union of Operating Eng'rs, Hoisting & Portable Local* No. 101, 3 F.3d 281 (8th Cir. 1993) (holding that a forced resignation itself constitutes the employer's last discriminatory act); *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987) ("[R]esignation is a constructive discharge – a distinct discriminatory 'act' for which there is a distinct cause of action.").

[6] Three circuits have adopted the minority position. *See Green v. Donahoe*, 760 F.3d 1135, 1137 (10th Cir. 2014) (finding that employee did not exhaust his administrative remedies because

SUMMARY OF ARGUMENT

In our civil legal system, statutes of limitations and filing deadlines function to strike a careful balance between upholding principles of equity and access to justice on one hand, and fostering finality and clarity on the other. That equilibrium is especially important in the context of civil rights laws that combat discrimination and are intended to be navigated by laypersons, unaided by an attorney. The Tenth Circuit's position has upset this careful balance.

The immediate question here is when the 45-day filing period in which federal employees are required to report workplace discrimination commences. But the broader issue is whether the Court should maintain the clear, simple Date-of-Resignation Rule that is already embraced by the majority of circuits – or whether it should instead shift to the unworkable Last Discriminatory Act Standard which erects an unnecessary procedural barrier to the fair adjudication of workplace discrimination and harassment claims. Title VII, precedent, and prudence counsel in favor of the former approach for two overarching reasons.

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the filing period for a constructive discharge claim begins to run on the date of the employer's "last misconduct"); *Mayers v. Laborers' Health & Safety Fund*, 478 F.3d 364, 368 (D.C. Cir. 2007) (per curiam) (applying Last Discriminatory Act Standard and dismissing a constructive discharge claim under the ADA as untimely); *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992) (holding that the filing period for a claim of constructive discharge is triggered on the date that an employer "takes some adverse personnel action" against an employee).

First, considerable experience in tackling employment discrimination augurs in favor of a clearly demarcated filing period for constructive discharge claims. As part of Title VII's mandate to eradicate discrimination in the economy, the law encourages employers and employees to reach mutual understandings and work together to overcome prejudice. The Date-of-Resignation Rule is clear and accomplishes the important goal of encouraging private resolution: because the filing period does not begin until an employee has resigned, it allows the employee to explore internal channels before engaging in litigation. This rule therefore recognizes that employees who suffer discrimination should have the time to weigh their employment options and consider the various professional and personal consequences – like the need to support their families, pay rent, and meet other financial obligations – before quitting and initiating litigation. The case law confirms that this simpler rule has proven to be administrable and advisable across a variety of situations, including cases of racial and gender discrimination and sexual harassment.

Second, there are real problems with the Tenth Circuit's Last Discriminatory Act Standard. It is unwieldy and innately indeterminate, particularly since it is often unclear – in the midst of a series of discriminatory measures – which particular act is the "last" one. Moreover, it is unfair and implausible to expect a layperson to recognize that the filing period commences before the employee has resigned or could be considered "constructively discharged" as a matter of law. And for those employees that do properly identify the trigger date, the Last Discriminatory Act Standard encourages snap decision-making, contrary to Title VII's goal of fostering conciliation. This

standard not only needlessly injects complexity into what should be a straightforward statute of limitations determination, in some instances, it also puts employees in a hazardous Catch-22, whereby resigning and remaining employed both involve legal pitfalls.

The Tenth Circuit's primary defense for this standard turns on the mistaken premise that employees may indefinitely delay their claims and it overlooks the fact that employers have a strong incentive – and considerably more power – to drag their feet and run out the clock.

The ultimate consequence of the Tenth Circuit's standard is stark: in just over one traditional pay cycle, employees could scramble to resolve serious issues of discrimination or harassment and still miss their one opportunity at relief. This is unjust and unnecessary. Employees already confront significant obstacles to proving constructive discharge, with cases involving the most odious racial slurs routinely discarded at the summary judgment stage. There is no basis for contorting the statute of limitations period such that constructive discharge claims are rendered functionally unavailable. Instead, this Court should ratify the simple and fair Date-of-Resignation Rule that a majority of circuits have already implemented and found to be readily administrable.

ARGUMENT

I. EXTENSIVE EXPERIENCE IN COMBATING EMPLOYMENT DISCRIMINATION DEMANDS A CLEAR, SIMPLE FILING PERIOD FOR CONSTRUCTIVE DISCHARGE CLAIMS.

Racial discrimination and harassment in the workplace remain serious problems for individual employees and the labor market as a whole.[7] Likewise, sexual harassment and gender discrimination are disconcertingly prevalent in the economy.[8] Thus, despite this country's real progress towards inclusion and equality in employment, the strong protections of Title VII remain as important as ever.

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[7] *See generally Race-Based Charges FY 1999 – FY 2014*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm (last visited July 7, 2015) (summarizing the total number of charges filed and resolved under Title VII alleging race-based discrimination).

[8] *See generally Sex-Based Charges FY 1997 – FY 2014*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm (last visited July 7, 2015) (summarizing the total number of charges filed and resolved under Title VII alleging sex-based discrimination); *Sexual Harassment Charges EEOC and FEPAs Combined: FY 1997 – FY 2011*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited July 7, 2015) (summarizing the total number of charges filed and resolved under Title VII alleging sexual harassment discrimination).

LDF and NWLC share more than a century of experience fighting for civil rights. That litigation record, combined with our practical experience in the field of employment law, confirms that a straightforward and comprehensible rule to determine when the statute of limitations begins to run – like an employee's resignation date – is necessary for Title VII to achieve its goal of eliminating unlawful discrimination in the workplace.

A. Practice and Policy.

As this Court made clear in *Ricks*, "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Del. State College v. Ricks*, 449 U.S. 250, 262 n.16 (1980). In the context of constructive discharge law, the Date-of-Resignation Rule offers a straightforward statute of limitations trigger date that comports with the objectives of Title VII.

The goal of Title VII is to eliminate discrimination in the workplace. *See, e.g., Albemarle*, 422 U.S. at 421 (asserting Title VII's "central statutory purpose [is] . . . eradicating discrimination throughout the economy"). The statute seeks to achieve that objective by, *inter alia*, promoting policies of conciliation, mediation, and non-litigation remedies in order to encourage employers and employees to work together to achieve mutual understandings and overcome discrimination. *See* 42 U.S.C. § 2000e-5(b) ("[T]he Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (finding "cooperation and

voluntary compliance were selected as the preferred means for achieving [the] goal[s]" of Title VII); *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1509 (11th Cir. 1985) ("[T]he legislative history of Title VII indicate[s] that Congress intended Title VII to be enforced primarily through conciliation and voluntary compliance.").

The Date-of-Resignation Rule advances these goals by incentivizing employees to explore such options as mediation and other internal channels before resorting to litigation. Conversely, the Last Discriminatory Act Standard encourages employees to forgo or fast-forward informal resolution efforts and lodge a formal legal claim as early as possible, since the filing period begins to run before there has been a resignation or "constructive discharge" as defined by law. Indeed, the EEOC has confirmed that the Date-of-Resignation Rule better promotes careful and considered decision-making by employees. *See* Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of the Appellant (hereinafter "EEOC *Bailey Amicus*"), *Bailey v. United Airlines*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 at *12 (Mar. 26, 2001) ("Employees are free to file charges with the Commission when they feel that they have been subjected to unlawful discrimination. An employee, however, should not have his hand forced before a claim has ripened.").

The courts have also recognized the value of having employees stay in their jobs while informally resolving employment disputes and mitigating damages – even in the face of prospective retaliation. For example, this Court in *Suders* held that, when a discrimination claim does not hinge on a "tangible

employment action," employers may avail themselves of the *Ellerth/Faragher* defense, whereby the employer must show that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." 542 U.S. at 129.[9]

The Date-of-Resignation Rule is also prudent in practice. In some instances, the date of resignation

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[9] Furthermore, circuit splits have developed as to whether constructive discharge doctrine requires an employee to complain to higher management prior to resigning. *See generally* Brief of *Amicus Curiae* for the National Employment Lawyers Association (identifying circuit splits). In other ways, the pressures to stay in the workplace can be problematic, and give rise to an impossible situation for employees, *infra* at 13-15. *Compare Coffman v. Tracker Marine*, 141 F.3d 1241, 1247 (8th Cir. 1998) ("[S]ociety and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships.") (citation and internal quotation marks omitted) *with* Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. L. 401, 430 (2002) ("[R]equiring a plaintiff to mitigate her damages by remaining in a discriminatory environment is contrary to Title VII's rules for post-termination mitigation of damages."); *and* Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 Wm. & Mary J. Women & L. 273, 335 (2001) ("By overemphasizing preventive efforts, the Court ignores deterrence through damages and compensation (making victims whole) as other important goals of Title VII.").

and the date of the last discriminatory act are the same day. *See* Pet. Merits Br. 32. And, as detailed below, *infra* at 18-20, several courts have found the resignation itself constitutes the employer's last discriminatory act. *See e.g., Young*, 828 F.2d at 237-38; *supra* n.5 (discussing the position of the majority of circuits).

In other instances, employees need, and should have, sufficient time to weigh their options and any personal and professional consequences. The Date-of-Resignation Rule recognizes this basic reality by beginning the statute of limitations only after an employee has gone through that process and decided to resign, whereas the Last Discriminatory Act Standard truncates these considerations by starting the statute of limitations after a very brief period of time which is not likely to allow for meaningful internal negotiation or consideration of alternatives. It is particularly important for employees facing racial, gender and/or sexual harassment to duly consider their options, for two notable reasons.

First, like all people of good faith, employees facing discrimination and harassment struggle in earnest to make the best of a bad situation. This can involve an effort to resolve problems with the existing (discriminatory) managers or colleagues, only to later learn that resolution is difficult or impossible to achieve. Whether formal or informal, these internal processes and means of addressing discrimination in the workplace can be protracted and involved. And it is often the employer's failure to reasonably respond to concerns raised through these internal processes that makes resignation the only meaningful option.

The stakes involved in a decision to resign are often enormous for the personal life, economic livelihood,

and professional trajectory of the employee. In practice, employees need to gauge their ability to provide for their families, assess the availability of continuing health care, and determine their ability to pay rent before deciding to resign. *See, e.g.*, Shuck, *supra* n.9, at 428 ("Given the plaintiff's job position, or age, or gender, or race, or previous work experience, or any of a myriad of other factors, perhaps a 'reasonable' response would be to keep a low profile, or simply abandon the situation."). Many fear that, even if they are legally protected from retaliation, a formal report of discrimination functionally terminates the employment relationship.[10] Given this reasonable fear, particularly in discriminatory and hostile work environments, employees often resign first and then seek EEOC assistance. *See* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. Cal. L. Rev. 307, 310-11 (2004) ("[E]mployees are reluctant to sue their current employer and will often file a claim only after they have left their job.") Moreover, social science confirms that a whole range of personal and psychological

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[10] *See* Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 Law & Soc'y Rev. 67, 75 (1999) (recounting survey of female employees that "job loss, or fear of it, was the primary consideration for a serious consideration of litigation"); Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. Ark. Little Rock L. Rev. 117, 124-25 (2001) ("[O]nce an employee complains about discrimination on the job, he or she can usually consider that employment relationship over.").

pressures bear upon an individual who must decide whether to immediately quit or report discrimination.[11] A Date-of-Resignation Rule is best suited to address these circumstances.

These pressures are especially acute for federal employees, who face one of the shortest statutes of limitations in employment law. And while the federal sector now employs large numbers of women and racial minorities,[12] it still grapples with a significant number of discrimination claims.[13]

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[11] *See* A. Hila Keren, *Consenting Under Stress*, 64 Hastings L.J. 679, 711-13 (2013) (explaining that race and racism have a significant impact on how individuals experience stress and can trigger changes in cognition, behavior, and sociological perceptions of helplessness in certain workplace conditions); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 Colum. Hum. Rts. L. Rev. 545, 547 (2003) (summarizing studies which found that working-class African Americans facing discrimination experience higher stress and blood pressure and sometimes accept unfair treatment as a fact of life); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 896-901 (2008) (summarizing social science on women's responses to harassment, the social cost of complaining, and why some employees are reluctant to challenge discrimination); Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry 801, 804 (2006) (discussing studies and surveys showing that "minimization bias" leads women and people of color experiencing discrimination to resist acknowledging it as such and to fear being perceived as hypersensitive troublemakers).

[12] *See e.g.*, *Annual Report on the Federal Work Force Part II, Workforce Statistics, Fiscal Year 2011*, EEOC, http://www.eeoc.gov/federal/reports/fsp2011_2/upload/fsp2011_2.

Second, because it is already difficult to bring a successful constructive discharge claim, the statute of limitations period should not make it any harder. Laboring under what is supposed to be a system for laypersons, employees face a number of disconcerting obstacles to having their claims heard on the merits. For example, constructive discharge claims involving the most heinous racial slurs are routinely jettisoned, often at the summary judgment stage, on the dubious ground that the slurs were not unbearable *enough*.[14]

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pdf (last visited July 7, 2015) (finding that women and racial minorities comprise 43.8 percent and 34.8 percent of the federal workforce, respectively).

[13] *See, e.g.*, Joe Davidson, *Report Shows Lack of Diversity in Top Civil Service Ranks*, Wash. Post (Aug. 19, 2014) http://www.washingtonpost.com/politics/federal_government/report-shows-lack-of-diversity-in-top-civil-service-ranks/2014/08/19/372a1130-27c8-11e4-86ca-6f03cbd15c1a_story.html (describing role of discrimination and retaliation).

[14] *See Cavalier v. Clearlake Rehab. Hosp., Inc.*, 306 F. App'x 104, 106, 107 (5th Cir. 2009) (unpublished) (concluding co-worker's repeated use of the term "boy" and threat to "beat the tar off of" the plaintiff were not sufficiently hostile or intolerable); *Tawwaab v. Va. Linen Serv., Inc.*, 729 F. Supp. 2d 757, 766, 774, 776, 783-84 (D. Md. 2010) (finding that statements "black motherfucker" or "black bastard" and co-workers displaying of monkey statue while stating "This is what I think of you. You are monkeys to me," were insufficient to support constructive discharge claim); *Green v. Harris Publ'ns, Inc.*, 331 F. Supp. 2d 180, 192, 195 (S.D.N.Y. 2004) (finding co-worker's statements in reference to a rumor employer was looking for a "token nigger" were not intolerable); *see also Webster v. Town of Warsaw*, 66 F. Supp. 3d 706, 709-10 (E.D.N.C. 2014) (granting motion to dismiss on the grounds that

Moreover, the inconsistent application of the law around constructive discharge has created disjointed and unfair circuit splits as to whether essentially identical, discriminatory messages constitute a constructive discharge. *Compare Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909-10 (8th Cir. 2003) (concluding that bathroom graffiti associated directly with plaintiff, such as "kill all niggers," "coon," and "all niggers must die," was insufficient to make out a constructive discharge claim) *with Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1077, 1080 (6th Cir. 1999) (concluding that bathroom graffiti, such as "kill all niggers," was sufficient to show that conditions were so intolerable that a reasonable person would quit).

B. Supporting Case Law.

The case law confirms that a simple filing period, rooted in an employee's unambiguous resignation, is more administrable and advisable across a range of scenarios. Indeed, the bulk of the circuits – five out of eight – have already reached this reasoned conclusion and held that the filing period begins to run on the date of the employee's resignation. *See supra* n.5.[15]

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the repeated use of "boy" directed at the police chief was offensive but not intolerable).

[15] The origins of the circuit split in this case further demonstrate that the Date-of-Resignation Rule is more consistent with this Court's jurisprudence. The split arose in the early 1990s, largely over divergent understandings of *Ricks*, which involved a scholar who was denied tenure and offered a terminal one-year contract. In *Ricks*, this Court ruled that the limitations period began to run when the employee was offered

Moreover, even under the Tenth Circuit's "last discriminatory act" view, some courts have ruled that an employee's resignation is itself the operative "discriminatory act." For instance, the Fourth Circuit held that when an employee is constructively discharged, his or her resignation itself is "a distinct discriminatory 'act' for which there is a distinct cause of action," and from which to measure the applicable administrative deadlines. *Young*, 828 F.2d at 237-39 (reversing lower court ruling).

In the context of racial discrimination, lower courts have also used the date of resignation as the relevant benchmark in a variety of constructive discharge cases. *See e.g.*, *Scott v. Lee Cty. Youth Dev. Ctr.* 232 F. Supp. 2d 1289, 1295 (M.D. Ala. 2002) (adopting "the uniform rule" that the "filing period is measured from the date the employee gives notice of his intent to resign" because "in a constructive discharge case only the employee can know when the atmosphere has been made so intolerable that he must leave" due to

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the terminal contract, rather than one year later, when the contract expired. *Ricks*, 449 U.S. at 261-62. Early on, several circuits – namely the Fourth, Eighth, and Ninth – read *Ricks* as supporting the Date-of-Resignation Rule because the resignation was functionally equivalent to *Ricks*' discharge (his denial of tenure). But later, the Last Discriminatory Act Standard emerged when the Seventh Circuit compared an employee's resignation to the mere "consequences" of the employer's original discrimination and therefore concluded it was irrelevant for purposes of commencing the statute of limitations. *Davidson*, 953 F.2d at 1059 (7th Cir. 1992) (filing period triggered when employer "takes some adverse personnel action"). Only one other court, beyond the Tenth Circuit, adopted the minority view. *Mayers*, 478 F.3d at 369-70.

racially hostile work environment); *Adames v. Mitsubishi Bank Ltd.*, 751 F. Supp. 1565, 1570 (E.D.N.Y. 1990) (measuring the filing period for an EEOC claim "from the date the employee gave notice of her intent to resign" in a race and national origin discrimination case); *see also Rosier v. Holder*, 833 F. Supp. 2d 1, 7 (D.D.C. 2011) (discussing why the ongoing nature of hostile conduct that gave rise to a constructive discharge claim makes the reporting timeline more expansive); *Serrano-Nova v. Banco Popular de Puerto Rico, Inc.*, 254 F. Supp. 2d 251, 262 (D.P.R. 2003) (finding that a resignation that constitutes a constructive discharge constitutes a discriminatory act, but holding that, given a delay in that case between the discriminatory act and resignation, the plaintiff could not use her resignation as an "anchor" for earlier acts).

Likewise, when confronting gender discrimination and sexual harassment, many courts have adopted the Date-of-Resignation Rule. *See, e.g.*, *Flaherty*, 235 F.3d at 138 (concluding, in a constructive discharge claim based on age and sex discrimination, that the accrual date "was the date when [plaintiff] gave definite notice of her intention to retire, and the rule should be the same in all cases of constructive discharge"); *Draper*, 147 F.3d at 1111 (finding, in Title VII action alleging hostile work environment, constructive discharge, and sexual harassment, that the date of discharge triggers the limitations period); *Hukannen*, 3 F.3d at 285 (holding, in a sexual harassment claim, that "[w]hen Title VII violations are continuing in nature, the limitations period" does not run until the employee's constructive discharge, which also constitutes "the last occurrence of discrimination").

The use of the Date-of-Resignation Rule in the cases described above is particularly effective given the unique nature of a constructive discharge, where the employee's decision to resign is a crucial element of the cause of action. Indeed, this Court has made clear that the employer's acts prior to the employee's resignation constitute merely "precipitating conduct" leading up to the key constituent element of the claim: the employee's resignation. *Suders*, 542 U.S. at 148 ("A constructive discharge involves *both* an employee's decision to leave *and* precipitating conduct.") (emphasis added).

The EEOC has also endorsed the Date-of-Resignation Rule, filing an *amicus* brief in support of the rule in the Third Circuit. *See* EEOC *Bailey Amicus*, *supra*, at *12. Drawing upon precedent from the First, Second, Fourth, and Ninth Circuits, the EEOC concluded that the "operative date" for the filing window was "the date on which the employee acts on the option under the terms specified by the employer." *Id.* at *10. The EEOC also explained that "[t]his approach to the timeliness issue is fully compatible with the Supreme Court's decision in *Ricks*," *id.* at *10, and most faithful to the policies undergirding Title VII, *id.* at *12.

II. THE "LAST DISCRIMINATORY ACT" STANDARD IS UNWIELDY, UNFAIR, AND CONTRARY TO THE PURPOSES OF TITLE VII.

In contrast to the many advantages of the Date-of-Resignation Rule, the Tenth Circuit's Last Discriminatory Act Standard is needlessly unwieldy and unfair, and cannot be fairly administered. In some instances, the Last Discriminatory Act Standard may place employees in a perilous Catch-

22, in which both resigning from, and remaining in, an employment position may impose obstacles to challenging discrimination. The Last Discriminatory Act Standard should therefore be rejected by this Court.

First, the standard itself is inherently nebulous. Whether the last "act" includes a resignation itself is disputed among the circuit courts, *see supra* at 5 nn.5-6 (discussing circuit split). Moreover, the "last discriminatory act" is often not immediately clear, particularly when a series of discriminatory, retaliatory, or harassing acts give rise to the constructive discharge. *See, e.g.*, *Draper*, 147 F.3d at 1107 (finding that "persistent harassment" and disparate treatment over two years, rather than a particular instance, gave rise to the constructive discharge). In the heat of the moment, it can be difficult to ascertain whether a particular act is the "last" one, let alone whether a court would consider it to be independently or aggregately actionable. *See* Beiner, *supra* n.9, at 331 ("Harassment victims should not be summarily dismissed for initially failing to report or delaying reporting until the incidents are repeated or become more severe. Indeed, expecting immediate reporting is counter-intuitive, especially given that the sexual harassment might not yet have reached an actionable level or a level that the victim believes she can no longer handle.").

This is particularly true when lower courts have drawn fuzzy – and sometimes indecipherable lines – between a work environment that is hostile but somehow bearable and another that is hostile but intolerable. *See* Chamallas, *supra*, at 316 ("Factfinders are thus called on to make fine

calibrations of the magnitude of the harassment faced by the plaintiff, implicitly judging between harassment that is bad enough to amount to a change in working conditions for the plaintiff (the 'severe or pervasive' standard for hostile environments), but not bad enough to justify plaintiff quitting her job (the 'intolerable' standard for constructive discharge)."). *See supra* at 17 (discussing circuit splits regarding similar racial slurs and death threats inscribed in bathroom).

These determinations will be further complicated in cases where the employer's ongoing failure to address discrimination in the workplace forces an employee's resignation, as a "last act" standard does not easily map on to discrimination that is perpetuated based on an employer's failure to remedy a hostile environment. *See, e.g., Kimzey v. Walmart Stores, Inc.*, 107 F.3d 568, 575 (8th Cir. 1997) (allowing constructive discharge claim to go to the jury based on employer's inaction in the face of complaints of sexual harassment); *Hunt v. State of Mo. Dep't of Corrections*, 297 F.3d 735, 744 (8th Cir. 2002) (same). The victimized employee should not bear the burden of parsing each encounter with the employer to determine which act would constitute the legally acceptable "last straw" in the employer's discriminatory conduct.

The lack of clarity in the Tenth Circuit's standard injects an unnecessary degree of complexity into what can and should be a straightforward statute of limitations determination. As a result, the standard incentivizes frontloading needless and onerous substantive questions into mini-trials about whether an employer's acts were, or were not, part of a

discriminatory course of conduct and when the last discriminatory act took place.

Additionally, the Tenth Circuit's Last Discriminatory Act Standard creates a real risk of unfairness by placing artificial barriers to enforcement of the civil rights laws. *Ricks* rightly warned against the dangers of making it "difficult for a layman to invoke the protection of the civil rights statutes." 449 U.S. at 262 n.16. The Last Discriminatory Act Standard imposes just this kind of difficulty because it is profoundly counterintuitive to ask laypersons to recognize that the clock has begun to run on their constructive discharge claim before they have resigned and, thus, before they have a constructive discharge claim as a matter of law. *See also* Merits Br. 32-34. It is simply unrealistic to expect employees facing hostile work environments and weighing their options to calculate, in real-time, when the "last discriminatory act" may have occurred and when the 45-day clock may start running.

Furthermore, in some parts of the country, employees facing a constructive discharge may also find themselves in a Catch-22. The circuit courts are split as to whether employees must complain to higher management prior to resigning.[16] Thus, in

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[16] *See generally* Brief of *Amicus Curiae* for the National Employment Lawyers Association (identifying circuit splits). While the Court need not resolve that split in this case, it should be aware that there are serious problems with how some courts have required the use of internal grievance procedures. *See also supra* n.9 (discussing how overemphasis of mitigation of

some circuits, employees who quit immediately after an employer's discriminatory act are more likely to meet the 45-day filing deadline, but risk rejection of their claim for failure to utilize their employers' internal remedies to address the complained of discrimination – while those who stay in their jobs after a discriminatory act and try to resolve matters internally risk missing the filing deadline.[17] This is patently unworkable in a system for federal employees, who are laypersons working around a condensed, 45-day filing period.

Ultimately, the repercussions of the Last Discriminatory Act Standard frustrate the central purposes of Title VII altogether, *supra* at 10. As the EEOC has previously explained, incentivizing snap decisions and a rush to adversarial processes is counter to the spirit of Title VII. Rather, it is important to ensure that employees are "not rushed into the filing of an EEOC charge" as they carefully weigh considerations. *See* EEOC *Bailey* Amicus, *supra*, at *2.

In the face of this onslaught of practical problems that attend the Last Discriminatory Act Standard, the Tenth Circuit's holding hinges on the dubious premise that a simple Date-of-Resignation Rule

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damages and requiring employees to stay in discriminatory workplace is contrary to the aims of Title VII).

[17] *See also* Beiner *supra* n.9, at 331 (noting that harassment victims can be "caught in a difficult catch twenty-two."); Brake &. Grossman, *supra* n.11, at 886 (explaining that the "time spent trying to resolve discrimination complaints internally seriously jeopardizes employees' formal assertion of rights").

somehow leads employees to game the system by delaying their resignation, thus controlling the timing of their claims. But an employee who indefinitely delays resignation without rationale is unlikely to succeed on the merits of a constructive discharge claim. *See Landrau-Romero v. Banco Popular De Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) ("If a plaintiff does not resign within a reasonable time period after the alleged harassment, he was not constructively discharged."); *Draper*, 147 F.3d at 1110 n.2 (noting "[t]he frequency and freshness of the instances of harassment" affects any adjudication on the merits). For this reason alone, employees are unlikely to manipulate a Date-of-Resignation Rule to their benefit.

Moreover, the notion that the filing period must be constructed to discourage employees from sitting on their claims ignores the fact that a Last Discriminatory Act Standard gives *employers* a strong incentive to delay internal administrative processes that an employee may turn to first in order to address discrimination – as well as the fact that employers have considerable power to delay the process. "Employers have a great deal of control over the length of time such processes take, whether employees use them, and the extent of employees' reliance on and hopes for such processes," and "it is all too easy for such internal processes to run out the clock on asserting rights through the formal statutory mechanisms." Brake & Grossman, *supra* n.11, at 886.

For all these reasons, the Date-of-Resignation Rule would best address these concerns by providing a date certain on which both employers and employees can rely while best serving the aims of Title VII.

CONCLUSION

The standard adopted by the Tenth Circuit presents a serious procedural barrier to the adjudication of workplace discrimination and harassment claims and may prevent aggrieved federal employees from receiving appropriate relief. The Court should adopt a simple, fair, and administrable rule, as the majority of the circuits have implemented. For the foregoing reasons, this Court should reverse and remand.

Respectfully submitted,

SHERRILYN IFILL
Director-Counsel
JANAI NELSON
CHRISTINA SWARNS
JIN HEE LEE
LILIANA ZARAGOZA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

JOHN PAUL SCHNAPPER-CASTERAS *
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005
202-682-1300
jschnapper@naacpldf.org

MARCIA D. GREENBERGER
Co-President
EMILY J. MARTIN
FATIMA GOSS GRAVES
AMY K. MATSUI
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW #800
Washington, DC 20036

* *Counsel of Record*

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